Multifamily Broadband Council

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Board of Supervisors
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November 28, 2016

RE: **Proposed Ordinance – Police Code – Choice of Communications Services Providers in Multiple Occupancy Buildings**

Dear Board of Supervisors:

The purpose of this letter is to express the strong opposition of the Multifamily Broadband Council ("MBC") to the proposed Ordinance entitled "Choice of Communications Service Providers in Multiple Occupancy Buildings" (referred to herein as the "Ordinance"). We believe the Ordinance, while well intended, will have a discriminatory effect on lower and fixed income tenants including seniors and students, encourage poor customer service, create chaos in the marketplace and in multi-tenant buildings, mire the system in legal battles, stifle competition from small business entrepreneurial start-ups and limit investment in San Francisco broadband infrastructure from all but the deep-pocketed and monopolistic incumbents.

MBC is a national trade association composed of small, entrepreneurial independent broadband service providers serving multi-dwelling unit ("MDU") properties throughout the United States. *MBC represents the only competitors to large incumbent cable and broadband providers and has done so for a long time*. Our previous incarnations include the Independent Telecommunications & Cable Association

("ICTA"), founded in 1995, which became the Independent Multi-Family Communications Council ("IMCC") in 2001. Although the name has changed over the years, our mission has not – namely, to speak for independent competitive service providers, and *therefore* for consumers who desire an alternative to huge monolithic incumbent providers. Our members are and have been leaders in deploying innovative products and services and in maintaining an undying commitment to the customer. MBC members have provided Gigabit Internet, competitive WiFi, as well as digital video and phone services years before larger service providers. For example, we were the prime moving force in persuading the Federal Communications Commission ("FCC") to adopt rules governing the disposition of cable inside wiring for video services in MDU buildings (*see* 47 C.F.R. §§ 76.804 *et seq*.). Those rules have played a major role in facilitating competition for video services in MDU buildings throughout the United States. Without MBC, the *competitive* segment of the industry would be without any collective voice at all.

We believe that it is important to stress MBC's history and experience in enhancing competition and consumer choice because advocates for the Ordinance are using pro-competition rhetoric to urge its passage. MBC believes exactly the opposite – if the Ordinance becomes law, competition will be stifled and consumer choice limited, and the purpose of this letter is to explain the basis for our position.

1. **If the Ordinance becomes law, effective competition will cease to exist**.

Although this proposition sounds counter-intuitive, it is not for the following reasons:

Unlike large, deep-pocketed incumbents (*e.g*., Comcast and AT&T), smaller competitors depend on third-party financing in order to construct a network on an MDU property. That means when any of MBC's members secures a project, it must secure a loan or line of credit from a bank or other lender in order to finance construction of a signal distribution system. Unless the service provider can demonstrate a likelihood of success with regard to a particular project, the bank will not fund it. One of the key indicators of likely success is a valid enforceable "right-of-entry" ("ROE") agreement granting to the provider protected and undisturbed use of wiring inside the building(s).

If the Ordinance becomes law, no service provider can be granted protected and undisturbed use of their wiring. Therefore, smaller competitive service providers will not be able to secure funding to construct an on-site network, and will abandon the San Francisco market altogether. As a result, the *only* choice available to consumers who live in multi-tenant properties will be among huge monolithic incumbents that do not require outside financing for the build-out of specific projects.

Section 1 (b) of the Ordinance says: "The City and the County of San Francisco can use its police powers to ensure that occupants of multiple occupancy unit buildings can obtain communications services from providers of their choice." *While MBC agrees with and wholeheartedly supports this goal, passage of the Ordinance will guarantee that fewer competitive providers will be available to the occupants of multi-tenant properties*.

2. **If the Ordinance becomes law, lower income consumers, students and seniors will be at risk of losing cable and broadband services altogether.**

Typically, bulk billing arrangements are used by property owners and service providers to provide affordable cable and broadband services to shared-living environments like retirement and nursing homes, student housing, and lower or fixed income residents, including the elderly.

Under a bulk billing arrangement, the service provider agrees to provide service to 100 percent of the residential units in an MDU building, and the owner of the building pays a monthly bulk service fee to the provider at a small fraction of the retail cost of programming and broadband services. The owner then recovers a *pro-rata* share of the bulk service fee from each resident in the form of rent (or, in the case of a condominium, in the form of association fees). The key to bulk arrangement is this: because the service provider is providing service to all units, it can access deeply discounted programming costs and afford to sell that service at a significantly discounted rate, usually at least 50% less than what a consumer would pay for the same service in a single-family home. In a 2010 Order affirming the legality and benefits of bulk billing arrangements, the FCC described such arrangements as follows: "Bulk billing arrangements require the [service provider] to offer service to every resident of the MDU, and the MDU owner to pay

for service to all residents, although typically at a significantly discounted rate."[1] The FCC went on to describe the benefits of bulk billing arrangements:

> In the large majority of cases, bulk billing appears to lower prices, increase the volume and variety of programming, encourage high quality and innovation, and bring video, voice, and data services to MDU residents.[2]
>
> [Service providers, real estate interests and some consumers] point out that bulk billing enables lower income tenants to avoid cable rate increases (if it provides for steady prices for several years); these tenants also avoid high deposits and the limitations imposed by their own imperfect credit histories. In these ways, bulk billing can make MVPD services available to some MDU residents who otherwise would not be able to afford them.[3]
>
> … it would be a disservice to the public interest if, in order to benefit a few residents, we prohibited bulk billing, because so doing would result in higher MVPD service charges for the vast majority of MDU residents who are content with such arrangements. Based on the evidence in the record before us, we choose not to take action that would raise prices for most MDU residents who are subject to bulk billing. Accordingly, we will allow bulk billing by all MVPDs to continue because, under current marketplace conditions, it is clear that it has significant pro-consumer effects.[4]

If the Ordinance becomes law, bulk billing arrangements will cease to exist in all markets subject to the Ordinance. That is because service providers are prohibited from offering bulk-discounted services if the services are not being sold to 100 percent of the units at a property. It follows that if the Ordinance becomes law, consumers will lose the benefits of bulk billing arrangements – principally, the possibility of receiving high-quality services at significantly lower costs. If bulk billing ceases to be an option, those consumers who most depend on such arrangements – namely, shared living environments like retirement and nursing homes, student housing, as well as lower and fixed income residents – will likely receive severely limited service or no service at all.

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[1] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments,* Second Report and Order, MB Docket No. 07-51, March 2, 2010, ¶ 6.
[2] *Id*., ¶ 9.
[3] *Id.,* ¶ 18.
[4] *Id.*, ¶ 28.

With respect to senior housing, it is crucial to bear in mind that the availability of a reliable broadband service connection is not so much an amenity as it is a life and safety issue. Elderly and infirm residents of nursing homes and hospice facilities use broadband networks to contact on-site health professionals in the event of an emergency. Consequently, by eliminating the bulk billing arrangements that are used to bring affordable services to senior housing facilities, the Ordinance would put the very lives of their residents at risk.

In addition, as with protected and undisturbed wiring arrangements, the use of bulk billing arrangements is often an essential condition for an independent service provider's obtaining funding to bring service to an MDU property.[5] If bulk billing arrangements are precluded, there will be *less*, not more competition and consumer choice.

3. **If the Ordinance becomes law, service providers will not agree to customer service commitments.**

Competitive service providers – including MBC members – often agree to commit to a "service level agreement" ("SLA") in their ROE agreements. A typical SLA includes mandatory time deadlines for repairing service interruptions and outages, completing installations, and enforceable standards to maintaining minimum bandwidth to a property. In addition, many SLAs prohibit the service provider from imposing data-usage caps and from violating network neutrality principles. *Large incumbent cable and telco providers (including Google Fiber) do not generally agree to SLA clauses*. That's exactly why competitive providers make enforceable customer

[5] In the Second Report and Order previously cited, the FCC took notice of the importance of bulk billing for the funding of competitive service providers. Footnote 23 says: "Boca Raton Comments at 3 ("upstart" new entrants cannot obtain financing to wire buildings with fiber without the "reliable, long term revenue stream" that bulk billing ensures); Camden Property Trust Comments at 4; CSI Comments at 3, 8; Home Town Comments at 1 ("Bulk discount agreements are the only means by which HTC can finance . . . construction to compete with the incumbent[s]"); *id* at 6 (financing to build fiber networks requires "reliable . . . long-term revenue streams, such as through a bulk services agreement"; otherwise, financing would be doubtful); Shentel Comments at 22; Wilco Comments at 6 (Wilco "depends upon a bulk billing agreement to continue the operations of its business and service its customers"); *id.* at 19 (noting the special financing difficulties of minority-owned PCOs); WorldNet Comments at 3, 9."

service commitments – SLAs are an effective method by which independent operators can distinguish themselves from the incumbent cable and broadband Goliaths. The benefits of having an enforceable SLA are obvious: consumers are *guaranteed* a minimum level of customer service.

A very significant portion (perhaps the majority) of service interruptions and related problems in multi-tenant properties are caused by issues relating to in-building wiring. However, *a service provider is only willing to commit to an SLA if that service provider has protected and undisturbed control over the wiring being used to deliver the service to the end-user*. If the wiring is shared with another provider, the uncertainty over which party is responsible for maintenance and repair will preclude any operator from agreeing to an SLA clause in an access agreement.

Enactment of the Ordinance would undermine the basis for SLA clauses in access agreements. Because it permits any service provider to access and use existing in-building wiring, the Ordinance would prevent any service provider from taking legal responsibility for maintaining that wiring. If no operator accepts maintenance responsibility for in-building wiring, no operator will agree to an SLA and consumers will end up with poor customer service.

4. **The Ordinance will spawn chaos and encourage unfair practices, including vandalism, in multi-tenant properties.**

If the Ordinance becomes law, the certain result will be the creation of new service-related problems in the markets it is intended to benefit. For example, assume that a multi-tenant property is served by Comcast Cable. If a resident wants Google Fiber's Internet service, Google Fiber will have a right under the ordinance to access and utilize the existing wiring and conduits to provide Internet service. If the resident wishes to retain Comcast's cable television service, the same wire may have to carry two signals provided by two different operators. However, the use of common wiring for two signals usually results in interference, hence service interruptions. Who is the resident supposed to call for customer service in this scenario? If the customer calls

Comcast, Comcast will tell the customer to call Google Fiber, and vice versa. The net result will be operational chaos and poor customer service leaving the customer to suffer.

Furthermore, the Ordinance fails to address the location of the demarcation point where the service provider's distribution wiring ends and the property owner's wiring (extending to and within the units) begins. Usually, the demarcation point is located in a lockbox or other secure facility that is owned by the service provider – Comcast in the example described above. If Google Fiber has the right to access and use the home run wiring, does it also have the right to break into Comcast's lockbox to access the demarcation point? Does Google Fiber have the right to install its own lockbox adjacent to Comcast's? What happens if there is not sufficient space for multiple lockboxes? If the Ordinance is enacted, the likely result will be technicians of multiple providers roaming multi-tenant buildings and looking for ways, including vandalizing proprietary lockboxes, for the purpose of disconnecting the incumbent's wires and reconnecting them to the other provider's distribution system. And because the Ordinance in effect dispenses with the need for a service provider to negotiate an access agreement with the property owner, none of this activity, and the liabilities it creates, will be regulated in an orderly or safe fashion.

5. **The Ordinance will remove any incentive for service providers to upgrade their on-site networks.**

If in-building wiring infrastructure is available for use by any and all service providers under the Ordinance, no service provider will have any economic incentive to invest in upgrading its network facilities at a multi-tenant property. The reason is that the financial decision to upgrade a network is based on the certainty (or near certainty) that the provider will recover its investment over time. However, if any and all competitors have equal access under the Ordinance to the wiring used to deliver services to customers at the property, the basis for the decision to upgrade networks will disappear. The result will be a lower quality of service for end-users.

Yet another way in which the Ordinance will negatively affect quality of service relates to wireless Internet services or WiFi. Broadband service providers deploy wireless access points in multi-tenant buildings which include an "instant on" feature allowing a new subscriber to activate his or her service upon move-in. However, the presence of multiple service providers, each deploying multiple wireless access points in a building will reduce the efficiency of each access point. Once again, the result will be a lower quality of service for end-users.

6. **The Ordinance will provide a litigator's paradise.**

The Ordinance allows any service provider to access existing inside wiring and other facilities owned by the property owner, provided that the operator pays "just and reasonable compensation" to the owner. Needless to say, the parties will disagree concerning what constitutes "just and reasonable compensation," and because they disagree, disputes will have to be resolved by courts. Because litigation over Federal Constitutional issues (like "just and reasonable compensation" for takings of property under the Fifth Amendment) requires years to resolve – years during which the market will remain mired in uncertainty and rancor – lawyers will make a lot of money and everyone else will suffer, especially those living in San Francisco's apartment and condominium buildings.[6]

The situation becomes even more dire when we consider that the Ordinance applies retroactively to void existing ROE agreements. The following scenario will become commonplace: A competitive service provider seeks access to a property that is subject to an ROE agreement under which the incumbent provider paid compensation to the owner in exchange for exclusive use of inside wiring. The competitive provider offers to pay "just and reasonable compensation" that is much less than the amount the property owner received from the incumbent provider.

[6] MBC's comments do not purport to describe the kind of problems that the Ordinance is certain to create in commercial multi-tenant properties.

Meanwhile, the incumbent provider demands that the property owner reimburse it for a portion of the compensation paid to the owner, given that the incumbent no longer has the exclusive right to use existing inside wiring. The result will be three-party litigation that will require years to resolve.

7. **Conclusion**.

As stated at the outset, MBC believes that the ultimate goal of the Ordinance is worthy, and our long and well-established track record in the industry proves beyond doubt MBC's commitment to the enhancement of competition in multi-tenant environments. However, we are *convinced*, based on our members' long experience in this industry, that the Ordinance will achieve precisely the opposite of its intended purpose. If the Ordinance becomes law, there will certainly be *fewer* entrepreneurial competitive service providers active in the San Francisco market, *fewer* options for residents of multi-tenant properties, lower or non-existent standards for customer service, and unfair discrimination against students, the elderly and infirm, and lower-income residents of your City. The end result will be that only the familiar large incumbent providers will be active in the market. Each of those providers will cherry-pick the best properties to access by means of the Ordinance, where "best" means the largest, most expensive apartment and condominium communities located in upscale areas of the City. Those unfortunate enough not to live at those locations will suffer the most from the absence of competitive alternatives, with few options and poor quality services if services are available at all.

For all of these reasons, the MBC respectfully urges the Board of Supervisors not to approve the Ordinance. MBC hereby requests additional time to meet with the Board of Supervisors and craft a revised Ordinance that properly addresses these concerns, protects the consumer's choice and allow competitors of all sizes to thrive. This issue is far too important to the residents and businesses of San Francisco to rush into a document which will create significant

unintended consequences and relegate your constituents to legal in-fighting, service level chaos, and – in the end – much less effective and innovative competition.

Sincerely,

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